

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Optical Telecommunications, Inc.)	MB Docket No. 14-258
)	CSR – 8895-C
Complaint Concerning Retransmission)	
of WXCW(TV), Naples, FL)	
)	

To: The Secretary, FCC

Attn: Chief, Media Bureau

REPLY TO OPPOSITION

Optical Telecommunications, Inc. and HControl Corporation (collectively “OpticalTel”) hereby submit this Reply to the Opposition to Petition for Reconsideration (“Opposition”) filed by Sun Broadcasting, Inc. (“Sun”) in connection with the Order of the Media Bureau in this proceeding.¹

Sun’s Opposition offers no new arguments or facts, but rather is merely a rehash of its continuing effort to extort double retransmission consent payments from Dish Network (“DISH”) and OpticalTel in connection with DISH’s retransmission of commercial television station WXCW to viewers in the private community of Sail Harbour, FL. As Sun knows full well, it has granted express, written authority for DISH to retransmit WXCW. If Sun is

¹ *Optical Telecommunications, Inc.*, DA 16-928 (rel. Aug. 15, 2016) (the “Bureau Order”).

dissatisfied with the terms of that agreement, or the consideration it receives from DISH thereunder, that is purely a contractual matter to be addressed between Sun and DISH.²

Sun's Opposition asserts that the Bureau Order found a violation of the retransmission consent requirement with respect to retransmission by DISH of WXCW to viewers at Sail Harbour during the period between Sun's initial claim (September 29, 2014) until December 12, 2014, when DISH confirmed that OpticalTel was an authorized non-transport DISH reseller. However, as OpticalTel's Petition for Reconsideration ("Petition") filed on September 14, 2016 makes clear, the Bureau Order's erroneous finding of a violation was based on a single sentence buried in a footnote of the copy submitted by DISH of the Sail Harbour Agreement dated December 1, 2005 between DISH and OpticalTel (the "2005 Agreement").³ As the Petition explains, that sentence was expressly excluded from the 2005 Agreement as signed by both parties, a complete copy of which had been provided by OpticalTel on October 15, 2015.⁴ In sum, the Bureau Order incorrectly relies on inapplicable language and OpticalTel never agreed to "transport" service for Sail Harbour nor was it ever requested to elect between "transport" and "sub-distribution" (non-transport) prior to December 12, 2014.

Sun's Opposition further asserts that DISH had not granted OpticalTel the authority to retransmit WXCW to viewers in Sail Harbour prior to December 12, 2014, citing the letter dated

² Bureau Order, ¶13.

³ OpticalTel Petition, pp. 2-4.

⁴ Contrary to Sun's assertion, OpticalTel has never suggested that its internal records do not contain "complete documentation" relating to Sail Harbour. Sun Opposition at 5. In fact, as noted in its Petition, OpticalTel provided a complete copy of the 2005 Agreement covering Sail Harbour, signed by both parties and initialed on each page. Based on the erroneous conclusion in the Bureau Order, it is evident that either DISH is at fault for failure to submit complete documentation from its internal records, or the Bureau misread the 2005 Agreement. Thus, while OpticalTel is confident that it has provided a full and complete copy of the 2005 Agreement from its own records, it continues to strenuously object to any adverse findings from documents relied upon by the Bureau Order but withheld from OpticalTel in a fundamental violation of due process.

March 3, 2016 from Alison Minea, Director & Senior Counsel for DISH. Significantly, that letter does not claim, and provides no evidence, that it had ever notified OpticalTel of any attempt by DISH to shift its legal retransmission consent obligation to OpticalTel. Rather, DISH asserts that prior to December 12, 2014, OpticalTel was operating under DISH's "transport" option, but offers no evidence that OpticalTel was ever asked to elect between "transport" and "sub-distribution" (non-transport) prior to that date.⁵

OpticalTel's Petition demonstrates that it has always been a fully authorized sub-distribution reseller at Sail Harbour. Indeed, by DISH's own admission, it did not even offer the "transport" option when the 2005 Agreement was entered into by the parties. Moreover, the 2005 Agreement used the older DISH template that did not provide the affiliate with the choice between "transport" and "sub-distribution" - - the template contract offering that election was not introduced by DISH until several years after the 2005 Agreement was signed. In addition, OpticalTel's Petition provided copies of invoices from DISH to show that it has consistently paid the "sub-distribution" rate for the package of local broadcast signals retransmitted by DISH - - the same rate established by DISH initially in the 2005 Agreement.⁶ In short, DISH's claim that OpticalTel has ever operated under the "transport" option at Sail Harbour is simply false.

Finally, it is telling that, like the Bureau Order, Sun's Opposition does not seriously address, let alone attempt to dispute, controlling Commission precedent that DBS resellers are

⁵ DISH does not dispute that it bears sole responsibility for obtaining all necessary retransmission consents where the reseller has not expressly elected the "transport" option and thus is authorized for "sub-distribution." DISH March 3, 2016 letter at Answer 1.b. ii - iv.

⁶ OpticalTel Petition, pp. 4-9. Thus, contrary to Sun's assertion, OpticalTel has always paid the "applicable fee" to DISH for retransmission consent authority. Opposition at 3. Indeed, OpticalTel is not aware of any claimed underpayments by DISH relating to Sail Harbour.

under no obligation to obtain duplicate consent for broadcast stations retransmitted by satellite carriers such as DISH. Under long-standing FCC authority, a satellite carrier's legal obligation to secure retransmission consent is not relieved or shifted merely because satellite carriers such as DISH often rely on various independent agents, dealers, sales representatives, installers, consumer electronics retailers, resellers, service and repair contractors, etc. in their process of provision of DBS service.⁷ None of those third parties (often referred to generically within the industry as "resellers") meet the legal definition of "MVPDs" and are under no requirement to obtain consent from the television stations retransmitted by the satellite carrier.⁸

Notably, the legal obligation under the Communications Act and the FCC's rules for satellite carriers to obtain retransmission consent is non-delegable. Thus, even where a reseller might expressly agree to "transport" (which is not the case here), at most that would create a contractual remedy for the satellite carrier. Assuming the enforceability of such a contractual provision, it would not relieve the satellite carrier from its legal retransmission consent responsibility or grant jurisdiction for the Commission to impose sanctions or negotiation obligations on any party other than the satellite carrier itself.

⁷ See, e.g., OpticalTel Answer, pp. 4-8; OpticalTel Petition, pp. 10-12 (citing *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Broadcast Signal Carriage Issues, 8 FCC Rcd 2965 (1993) ("1993 Must-Carry Order"), ¶ 131; *Implementation of the SHVIA of 1999*, Broadcast Signal Carriage and Retransmission Consent Issues, 16 FCC Rcd 1918 (2000), ¶ 14.)

⁸ Sun's reference to footnote 367 of the Commission's 1993 Must-Carry Order only serves to reinforce the established principle that agents, resellers and other third parties such as OpticalTel that support a satellite carrier such as DISH: 1) are not defined as "MVPDs," 2) are not subject to the copyright compulsory license for broadcast signals, and 3) are not required to obtain retransmission consent. As the footnote cited by Sun makes clear, the sole exception to this rule is when a satellite carrier transports broadcast signals to a cable operator, which itself is an MVPD and eligible for a copyright compulsory license, the retransmission consent requirement falls on the cable operator rather than the satellite carrier.

CONCLUSION

For the reasons set forth herein and in the Petition, it is clear that the Bureau Order relied on inapplicable contractual language that was never agreed to by OpticalTel in finding that WXCW had been retransmitted without consent and ordering OpticalTel to engage in good faith negotiations with WXCW. Moreover, under controlling Commission precedent, DBS resellers such as OpticalTel are under no obligation to obtain duplicate consent for broadcast stations retransmitted by satellite carriers such as DISH. Accordingly, OpticalTel's Petition for Reconsideration of the Bureau Order should be granted.

Respectfully submitted,

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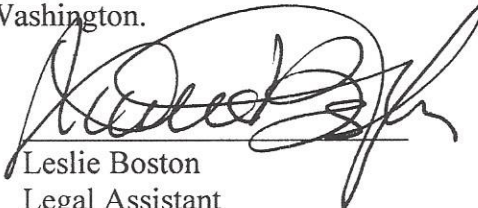
Date: October 3, 2016

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this date I sent, by first class U.S. mail and electronic delivery, a true and correct copy of the Reply to Opposition filed by Optical Telecommunications, Inc. and HControl Corporation, Inc. on October 3, 2016 to:

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Dated October 3, 2016, at Seattle, Washington.



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GSB:8085520.1